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No. 03-1210

Supreme Court, U.S.
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In The

Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals correctly applied the standard enunciated in *Strickland v. Washington* in determining that petitioner was not denied the effective assistance of counsel.

2. Whether a single use of the word "likely" constitutes the erroneous application of the *Strickland* prejudice standard when the opinion of the court of appeals repeatedly cites to *Strickland's* holding and to the "reasonable probability" standard set forth in that case.

3. Whether this Court has jurisdiction to review the denial of a certificate of appealability that was entered more than two years ago.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
ARGUMENT	6
I. THIS COURT SHOULD DECLINE REVIEW, AS THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD ENUNCIATED IN *STRICKLAND V. WASHINGTON* AND DETERMINED THAT PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL	6
II. THIS COURT SHOULD DECLINE REVIEW BECAUSE A SINGLE USAGE OF THE WORD "LIKELY" IN AN OPINION REPLETE WITH REFERENCES TO, AND QUOTATIONS FROM, *STRICKLAND* DOES NOT DEMONSTRATE THAT THE SIXTH CIRCUIT APPLIED AN INCORRECT STANDARD	8
III. CERTIORARI REVIEW OF THE REMAINING ISSUE PRESENTED BY PETITIONER MAY NOT BE GRANTED; THE SIXTH CIRCUIT DENIED A CERTIFICATE OF APPEALABILITY ON PETITIONER'S OTHER CLAIMS MORE THAN TWO YEARS AGO	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Bell v. Cone, 535 U.S. 685 (2002) 6, 8

Donnie E. Johnson v. State, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997) 2

Donnie E. Johnson v. State, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991) 2, 5

Donnie Edward Johnson v. State, No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994) 2

Hohn v. United States, 524 U.S. 236 (1998) 10

House v. State, 911 S.W.2d 705 (Tenn. 1995) 2

Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003) 1, 6, 7, 8, 9

Johnson v. Bell, No. 97-3052-DO (W.D.Tenn. Feb. 28, 2001) 2

State v. Johnson, 743 S.W.2d 154 (Tenn. 1987) 1, 3, 4

Strickland v. Washington, 466 U.S. 668 (1984) 6, 7, 8, 9

Wiggins v. Smith, 123 S.Ct. 2527 (2003) 6, 7, 8

Williams v. Taylor, 529 U.S. 362 (2000) 7, 8

Woodford v. Visciotti, 537 U.S. 19 (2003) 8, 9

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1, 10

28 U.S.C. § 2101(c) 10

28 U.S.C. § 2254(d) 6, 7

TABLE OF AUTHORITIES – Continued

Page

U.S.Sup.Ct.R. 13.1 10

U.S.Sup.Ct.R. 13.2 10

U.S.Sup.Ct.R. 13.5 10

OPINION BELOW

On September 10, 2003, in a published opinion, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of Johnson's petition for a writ of habeas corpus. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003). (Pet.App. 3a) On November 25, 2003, in an unpublished order, the Court of Appeals denied Johnson's petition for rehearing and for rehearing *en banc*. (Pet.App. 1a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Donnie Johnson, was convicted in 1985 of the brutal, premeditated murder of his wife, Connie Johnson. After a sentencing hearing, petitioner was sentenced to death, the jury having found two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (2) the petitioner had previously been convicted of one or more felonies that involved the use or threat of violence. Petitioner's conviction and sentence were affirmed by the Tennessee Supreme Court on direct appeal. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987) *cert. denied*, 108 S.Ct. 1303 (1988).

Petitioner subsequently sought state post-conviction relief. After an evidentiary hearing, the trial court denied

relief and that decision was affirmed on appeal. *Donnie E. Johnson v. State*, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991) *permission to appeal denied.* Petitioner then filed a second petition for post-conviction relief which was also denied by the trial court. On review, the Tennessee Court of Criminal Appeals initially reversed the trial court's holding, finding that petitioner had not personally waived certain issues. *Donnie Edward Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994). On appeal, the Tennessee Supreme Court remanded the case to the Court of Criminal Appeals for reconsideration in light of *House v. State*, 911 S.W.2d 705 (Tenn. 1995). On remand the court of criminal appeals affirmed the trial court's finding as to waiver and dismissed the petition. *Donnie E. Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997) *permission to appeal denied.*

On November 14, 1997, petitioner filed a petition for federal habeas corpus relief. On February 28, 2001, the district court issued an order denying relief on all of petitioner's claims and granting petitioner a certificate of appealability on the sole issue of whether he received ineffective assistance of counsel at the sentencing phase of his trial. *Johnson v. Bell*, No. 97-3052-DO (W.D.Tenn. Feb. 28, 2001). (Pet.App. 26a) Petitioner filed a notice of appeal and a motion to amend the certificate of appealability in the court of appeals and, on January 3, 2002, the Sixth Circuit denied petitioner's motion. (Pet.App. 25a) A second request to consider the amendment was likewise denied by the court on February 12, 2002. (Pet.App. 24a) Petitioner did not seek an order from this Court expanding the certificate of appealability. Following briefing and oral argument, the Sixth Circuit affirmed the judgment of the

district court denying habeas relief. A petition for rehearing and suggestion for rehearing en banc was denied on November 25, 2003. (Pet.App. 1a)

On February 19, 2004, petitioner filed a petition for writ of certiorari, seeking this Court's review of his claim of ineffective assistance of counsel and the denial of his motion to amend the certificate of appealability.

STATEMENT OF FACTS

On December 8, 1984, petitioner was at work when his wife, Connie Johnson, arrived to accompany him to dinner. Evidence showed that petitioner had been unfaithful in the past and had recently mentioned that he was contemplating a divorce. Connie Johnson died when petitioner forced a large plastic garbage bag into her mouth, resulting in strangulation and asphyxiation. According to the testimony, Ms. Johnson would have been conscious during some significant portion of the one-to four-minute ordeal. *State v. Johnson*, 743 S.W.2d at 156. Following the murder, petitioner enlisted the aid of a co-worker, Ronnie McCoy, to help him dispose of his wife's body. McCoy was on work release from a local penal farm at the time and was dependent upon petitioner for transportation to and from work. The two men placed Ms. Johnson's body in her van and drove it to a nearby shopping mall, where they left it parked, after which petitioner returned McCoy to the penal farm. *Id.*

The next day petitioner called his employer, James Force, to tell him that Ms. Johnson was missing. Mr. Force and his wife agreed to assist petitioner in searching for Ms. Johnson, and they were the ones to locate her van in

the mall parking lot. After the body was discovered, petitioner gave a statement to police in which he denied any knowledge of his wife's death. A search of the van revealed that Ms. Johnson's keys were missing. Those keys, along with some other personal items, were later found in petitioner's truck. Her sisters testified that the keys found in the truck were the only set that Ms. Johnson had for the van. *Id.* at 157.

During the sentencing phase of trial, petitioner, for the first time, asserted that it was Ronnie McCoy who had committed the murder and had forced petitioner to assist in disposing of the body. *Id.* at 157. Petitioner also presented the testimony of a minister who had visited with him while he was in jail. During the guilt phase, evidence had been introduced that petitioner was a good employee and that, on the day of the murder, petitioner and the victim seemed to be getting along. The State introduced evidence of petitioner's prior convictions for armed robbery and aggravated assault. The medical examiner was recalled to give further testimony regarding the murder itself, which the Tennessee Supreme Court noted was "inhuman and brutal to an almost indescribable degree." *Id.* The jury returned two aggravating factors and sentenced petitioner to death.

On post-conviction, petitioner alleged that his counsel were ineffective for failing to call various witnesses in mitigation. The witnesses presented during the state evidentiary hearing were members of petitioner's family, his employer, a long-time friend, and a jailor who observed petitioner's pretrial behavior. Family members stated that they had little or no contact with defense counsel but would have been willing to testify. If called, they would have said that petitioner was a good family man and

husband and that they were generally unaware of any problems in the petitioner's marriage. On cross-examination petitioner's sisters admitted that they were unaware of his relationships with other women. Petitioner's employer testified that he was a good worker. His friend stated that petitioner was a good family man but he was unaware of at least one of petitioner's extramarital relationships. A jailor testified that petitioner caused no trouble during pretrial confinement. Petitioner's minister testified as to petitioner's faith in God and his belief that he would one day have to give an accounting of his life to God.

Petitioner's counsel both testified that, although his family was cooperative in speaking with them, family members were unwilling to testify. The trial court found the testimony of counsel to be more credible, holding that the family members could not, or would not, testify. The court of criminal appeals found that, even if the family members had been called, their testimony would not have been helpful in light of petitioner's conviction for killing his wife. *Donnie E. Johnson v. State*, 1991 WL 111130 at *1-2.

ARGUMENT

I. THIS COURT SHOULD DECLINE REVIEW, AS THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD ENUNCIATED IN *STRICKLAND V. WASHINGTON* AND DETERMINED THAT PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In its September 10, 2003, decision affirming the denial of habeas relief, the Sixth Circuit held that, even if one assumed that the deficient performance prong had been met, petitioner had failed to establish that, "but for counsel's unprofessional errors, the result of the proceeding would have been different," as required by this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). *Johnson v. Bell*, 344 F.3d 567, 574-75. In so holding, the court noted, as did the state court and the district court, that the evidence that petitioner was a good family man was clearly at odds with the brutal murder of his wife and that such testimony would have opened the door to additional evidence regarding petitioner's extramarital affairs, further undercutting any favorable impact of such testimony. *Id.* at 574.

In this Court petitioner asserts that the court of appeals applied an incorrect legal standard in deciding petitioner's claim and "rejected" this Court's holding in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) in favor of *Bell v. Cone*, 535 U.S. 685 (2002). A review of the circuit court's opinion, however, shows that this position is without merit. This argument also ignores the language of 28 U.S.C. § 2254(d), which requires a federal court to determine the objective reasonableness of a state-court decision in light of then-existing Supreme Court precedent.

Petitioner attempts to draw a non-existent distinction between the holdings of *Wiggins* and *Cone*. His argument is based on his assertion that *Wiggins* and *Cone* require differing standards of review in assessing the adequacy of counsel's performance under the Sixth Amendment. To the contrary, it is quite clear from these opinions that both are firmly grounded in the holding of *Strickland v. Washington*, the touchstone of Sixth Amendment right to counsel cases.

Petitioner seeks to distinguish these holdings by noting the language in *Wiggins* that cites to the American Bar Association's Guidelines addressing investigation of a defendant's background. (Petition at 9-10) The problem with this distinction is two-fold. First, to the extent that an "adoption" of the ABA Guidelines is inherent in the *Wiggins* opinion – and respondent does not agree that it is – such a requirement goes beyond the holding of *Strickland* and, under 28 U.S.C. § 2254(d), could not be utilized as a basis for granting relief in this case, as *Wiggins* post-dates the state court decision by approximately 12 years. Second, even if the ABA standards should be considered for guidance, they go only to the first prong of deficient performance. In this case, the court of appeals *assumed* deficient performance but found that petitioner failed to establish prejudice. *Johnson v. Bell*, 344 F.3d at 574.

A further flaw in petitioner's argument is that the court of appeals did, in fact, consider *Wiggins* along with *Cone* and this Court's holding in *Williams v. Taylor*, 529 U.S. 362 (2000). The court specifically compared the facts of this case to *Wiggins*, noting that, "[w]hile counsel in *Wiggins* had sufficient information about their client's horrific childhood to render their failure to pursue further investigation professionally unreasonable, there is nothing

to suggest that counsel in the instant case ignored known leads that might have helped them to prepare their case in mitigation." *Johnson v. Bell*, 344 F.3d at 573-74. The court also stated that "[t]he mitigating evidence proffered by petitioner falls short of the quantum required by *Wiggins*, *Cone*, and *Williams*." *Id.* at 574.

Nothing in the decision of the court of appeals demonstrates a failure or an inability to apply the standard set forth in *Strickland*. This Court should decline to review this claim.

II. THIS COURT SHOULD DECLINE REVIEW BECAUSE A SINGLE USAGE OF THE WORD "LIKELY" IN AN OPINION REPLETE WITH REFERENCES TO, AND QUOTATIONS FROM, *STRICKLAND* DOES NOT DEMONSTRATE THAT THE SIXTH CIRCUIT APPLIED AN INCORRECT STANDARD.

In his second issue, petitioner asserts that the opinion of the court of appeals is in error because the court applied an incorrect standard in assessing the prejudice prong of his ineffective assistance of counsel claim. This claim is based entirely on one sentence in the Sixth Circuit's opinion, in which the court stated that, in considering the mitigation evidence presented on post-conviction, "we cannot say that this testimony would likely have led to a different result." The problem with this argument is that it suffers from the same flaws for which this Court chastised the Ninth Circuit in *Woodford v. Visciotti*, 537 U.S. 19 (2003).

Petitioner's argument mischaracterizes the opinion of the Sixth Circuit and asks this Court to ignore the multiple

references to, and quotations from, *Strickland*. The court, after discussing the facts and the applicability of the AEDPA to this case, began its analysis of the ineffective assistance claim by noting that *Strickland* provides the appropriate test and that to satisfy the prejudice prong "a defendant must demonstrate a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Johnson v. Bell*, 344 F.3d at 573. In the paragraph immediately preceding the sentence relied upon by petitioner, the court stated that "[o]ur inquiry is limited to asking whether the testimony . . . would have created *a reasonable probability* that, had the jury heard from them, its verdict would have been different." *Id.* at 574 (emphasis added). The court then concluded, quoting *Strickland*, that "petitioner has not shown that, 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 574-75.

As in *Visciotti*, the court's opinion must be viewed in its totality, not as individual words taken out of context. Petitioner, like the Ninth Circuit, makes "no effort to reconcile the [Sixth Circuit's] use of the term [likely] with its use, elsewhere, of *Strickland's* term 'reasonably probable,' nor did it even acknowledge, much less discuss, the [Sixth Circuit's] proper framing of the question." *Visciotti*, 537 U.S. at 360. The issue does not warrant review by this Court.

III. CERTIORARI REVIEW OF THE REMAINING ISSUE PRESENTED BY PETITIONER MAY NOT BE GRANTED; THE SIXTH CIRCUIT DENIED A CERTIFICATE OF APPEALABILITY ON PETITIONER'S OTHER CLAIMS MORE THAN TWO YEARS AGO.

Petitioner also seeks this Court's review of the Sixth Circuit's denial of a certificate of appealability on several additional claims. The orders in question were issued on January 3 and February 12, 2002. Although this Court had certiorari jurisdiction under 28 U.S.C. § 1254(1) to review the Sixth Circuit's 2002 orders denying an amended certificate of appealability in this case, *Hohn v. United States*, 524 U.S. 236 (1998), petitioner's opportunity to seek certiorari review from that order has long since expired. 28 U.S.C. § 2101(c); U.S.Sup.Ct.R. 13.1, 13.5. As to this issue, then, the instant petition is jurisdictionally out of time. U.S.Sup.Ct.R. 13.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. DEFICIENT PERFORMANCE 1

II. EFFECT OF COUNSEL'S DEFICIENT PERFORMANCE 3

III. JURISDICTION TO REVIEW THE DENIAL OF THE CERTIFICATE OF APPEALABILITY 5

Conclusion 7

TABLE OF AUTHORITIES

CASES

Bell v. Cone, 535 U.S. 685 (2002) 1, 2, 3

Hohn v. United States, 524 U.S. 236 (1998) 5

Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003) 1, 2, 3, 4

Major League Baseball Players Assoc. v. Garvey, 121 S. Ct. 1724 (2001) 6

Miller-El v. Cockrell, 537 U.S. 322 (2003) 5

Strickland v. Washington, 466 U.S. 668 (1984) 2, 3, 4, 5

Wiggins v. Smith, 123 S. Ct. 2527 (2003) 1, 2, 3

Woodford v. Visciotti, 537 U.S. 19 (2003) 3

STATUTUTORY PROVISIONS

28 U.S.C. § 1254 . . . . . 5, 6

28 U.S.C. § 2101(c) 5, 6

OTHER AUTHORITY

Sup. Ct. R. 13 5

ARGUMENT

In its brief in opposition to the petition, the Respondent (the State of Tennessee, on behalf of its warden, Ricky Bell) finds error in each of the court of appeals' two central holdings in the decision below. Yet the Respondent would have this Court deny review. The Petitioner respectfully submits that the Respondent's own brief shows that review of the court of appeals' decision – which is doubly flawed by the Respondent's own analysis – is warranted.

Additionally, the State of Tennessee argues, without citation to any interpreting authority, that this Court lacks jurisdiction to review the court of appeals' denial, at the outset of his appeal, of Donnie Johnson's motion for a certificate of appealability. The relevant statutes cited by the Respondent, as well as this Court's actual precedents, belie Respondent's jurisdictional argument.

I. DEFICIENT PERFORMANCE.

In its brief in opposition, the Respondent writes, "Petitioner attempts to draw a non-existent distinction between the holdings of *Wiggins* and *Cone*," referring to *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) and *Bell v. Cone*, 535 U.S. 685 (2002). Brief in Opposition at 7. The Respondent fails to note that the contradiction between *Wiggins* and *Cone* has not been drawn in this case just by the Petitioner, but, far more importantly, the contradiction was described and emphasized by the court of appeals. See *Johnson v. Bell*, 344 F.3d at 572-74. The identification and resolution of the contradiction between *Wiggins* and *Cone* by the court of appeals was the initial analytical hurdle that the court had to resolve in Johnson's appeal.

In its decision, the court of appeals initiates its entire analysis of the first, "deficiency" prong of *Strickland v. Washington* with the court of appeals' understanding that this Court has not yet resolved the proper application of the *Strickland* standard to capital-sentence mitigation investigations. *Johnson v. Bell*, 344 F.3d 567, 572 (6th Cir. 2003). Moreover, the court of appeals specifically cites *Wiggins* and *Cone* as contradictory interpretations of the *Strickland* standard that must be resolved for the court of appeals to decide Donnie Johnson's appeal. *Id.* at 573. Therefore, if the State of Tennessee is correct that it would be error to "draw a distinction" between this Court's decisions in *Wiggins* and *Cone,* then that error lies first, foremost, and fundamentally with the decision of the court of appeals below. If, as the State of Tennessee apparently believes, the court of appeals' decision is entirely premised on "a non-existent distinction," then this Court should accept the petition and correct the court of appeals' misunderstanding of the interplay of *Wiggins* and *Cone*.

Because the State of Tennessee has rejected the very basis of the court of appeals' decision on the "deficiency" prong of the *Strickland* standard, an analysis of the Respondent's secondary points on this issue would be of little benefit. One assertion in the brief in opposition bears further comment, however. In its brief, the Respondent writes, "In this case, the court of appeals assumed deficient performance but found that petitioner failed to establish prejudice." Brief in Opposition at 7. This statement appears to imply that the court of appeals did not actually decide Donnie Johnson's appeal based on the first prong (the "deficiency" prong) of the *Strickland* standard. Any such implication is false. The court of appeals specifically and explicitly affirmed the district court's decision because, according to the court of appeals, the district court correctly concluded, "[Johnson's trial]

counsel satisfied the Sixth Amendment standards governing the right to effective representation as defined by *Strickland v. Washington* . . . ." *Johnson v. Bell*, 344 F.3d at 569. *See also*, *id.* at 573 ("[W]e are hard-pressed to reconcile *Cone* with the conclusion that counsel rendered constitutionally ineffective assistance . . . ."). The Respondent's arguments simply cannot alter the basic fact that the court of appeals' honest and admitted confusion over whether to apply *Wiggins* or *Cone* to Donnie Johnson's appeal squarely affected the central holding of the court of appeals' decision.

II. EFFECT OF COUNSEL'S DEFICIENT PERFORMANCE.

Having apparently found error with the court of appeals' central holding, the Respondent similarly disagrees with the court of appeals' second, alternative holding under the second prong of *Strickland v. Washington*. The court of appeals specifically denied Donnie Johnson's appeal because the court of appeals concluded that correction of Johnson's attorneys' errors would not "likely have led to a different result." *Johnson v. Bell*, 344 F.3d at 574. The court of appeals' holding clearly conflicts with this Court's decision in *Strickland* (which explicitly rejected a "likely" standard of review for the second prong of its standard). *Cf.*, Brief of the Petitioner at 14-15.

Rather than defending the court of appeals' holding, the Respondent instead tries to rehabilitate the court of appeals's clearly-flawed holding by asserting that the court of appeals surrounded its holding with enough of this Court's additional language in *Strickland* to merit overlooking the court's actual reasoning. See Brief in Opposition at 8-9 (citing *Woodford v. Visciotti*, 537 U.S. 19 (2003)). The Respondent's argument reduces our system of law to mere window-dressing, where

a court's actual decision does not matter as long as the court quotes a sufficient quantum of precedential language. The Respondent's approach should be rejected in any type of case, but particularly so in a death-penalty case. The substance of the court of appeals' decision, as expressed in its specific holding, must be the primary basis for understanding whether the court of appeals' decision was correct. On that point, the State of Tennessee makes no argument.

Moreover, contrary to the assertion of the Respondent, this Court's decision in *Visciotti* supports Donnie Johnson's petition, because: 1) *Visciotti* reinforces the necessity of reviewing the actual substance of lower-court decisions on habeas review; and 2) *Visciotti* stands for the basic proposition that a "likely" standard of review of the effect of any attorney's deficient performance is too high under *Strickland*. In *Visciotti*, the California Supreme Court repeatedly used the term "reasonably probable" to define its understanding of the second *Strickland* prong, and the Ninth Circuit found the California Supreme Court's decision to be erroneous because, in one instance, it used the term "probable" without the modifier "reasonably." *Visciotti*, 537 U.S. at 23-24. This Court overturned the Ninth Circuit because – in its actual substance – the California Supreme Court used a standard that was appreciably lower than a "probable" (i.e., "likely") standard. *Id.* The State of Tennessee in this case, however, makes no similar argument that the court of appeals below – in the substance of its actual decision – used a standard that was appreciably lower than a "probable" or "likely" standard. The State cannot even make that argument, because the court of appeals actually did use an unconstitutionally-high "likely" standard of review. See *Johnson v. Bell*, 344 F.3d at 574. Therefore, the State of Tennessee now simply expresses the wan hope that, without regard to the actual substance of its decision, the court of

appeals quoted sufficient amounts of this Court's language in *Strickland* to avoid further review. The State of Tennessee's argument, by seeking to use the form of the court of appeals' decision as an excuse to avoid examining the substance of the decision, turns *Visciotti* on its head.

III. JURISDICTION TO REVIEW THE DENIAL OF THE CERTIFICATE OF APPEALABILITY.

In its brief in opposition, the Respondent asserts that this Court lacks jurisdiction to review the court of appeals' denial of Donnie Johnson's motions to expand the certificate of appealability. Brief in Opposition at 10. In support of this proposition, the Respondent cites 28 U.S.C. §§ 1254, 2101(c) and Sup. Ct. R. 13. A simple examination of Respondent's citations, as well as relevant authority of this Court, shows that Respondent's jurisdictional argument is baseless.

28 U.S.C. § 1254 provides, in pertinent part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ." As the Respondent correctly points out, because this Court has jurisdiction over cases in the courts of appeals prior to judgment in those courts, this Court possesses jurisdiction to review a court of appeals' denial of a certificate of appealability even prior to final judgment in the court of appeals. *E.g.*, *Hohn v. United States*, 524 U.S. 236 (1998)(cited by the Respondent). *See also*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003)(permitting certiorari review of a COA prior to final disposition in the court of appeals). But the fact that a preliminary order of a court of appeals is reviewable by this Court prior to a final decision in the court of appeals obviously does not, pursuant the explicit language

of section 1254(1), bar review of that preliminary decision by this Court following the court of appeals' final decision. *E.g.*, *Major League Baseball Players Assoc. v. Garvey*, 121 S. Ct. 1724, 1727 fn. 1 (2001)("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent judgments of the Court of Appeals."). Furthermore, nothing in 28 U.S.C. § 2101 alters this basic reading of section 1254; section 2101 simply requires that a petition for writ of certiorari be filed within 90 days of the Court of Appeals' final decision, as occurred in this case.

Having made only a flawed jurisdictional argument regarding Donnie Johnson's COA claims, the Respondent is silent on the merits of Johnson's petition on this issue.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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